

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 691 of 2000****For Approval and Signature:****HONOURABLE MR.JUSTICE C.K.BUCH****HONOURABLE MS.JUSTICE H.N.DEVANI**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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SONKUBHAI BAHJUBHAI KUNKANA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MS SADHANA SAGAR for Appellant
MR KP RAVAL, APP for Opponent

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 14/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1.The appellant has assailed legality and

validity of the order of conviction and sentence passed by the learned Sessions Judge, Valsad, at Navsari, dated 5th July 2000 in Sessions Case No.114/1999, whereby the appellant - accused had been held guilty of the offence under Section 304 (Part I) of the Indian Penal Code (for short "IPC") and sentenced to suffer a rigorous imprisonment for the period of 10 years with the fine of Rs.2,000/-, and in default of payment of fine, to suffer a simple imprisonment for one year. The appellant convict is the husband of deceased Bistuben, who succumbed to the injuries inflicted on her with an axe. Out of two blows, one blow given near neck, ultimately proved to be fatal and she succumbed to that grave injury inflicted on her at any time after 12.30 hrs. midnight and prior to 4.00 a.m. in the morning.

2.Ms.Sadhna Sagar, learned advocate appearing for

the appellant – accused has taken us through the oral as well as documentary evidence led by the prosecution, and has submitted that the accused should be acquitted as the prosecution has failed in bringing home the charge beyond reasonable doubt. While arguing for the appellant, Ms. Sadhna Sagar has argued that -

(i)The prosecution has failed to prove the motive as placed by the prosecution and therefore, with this infirmity, the accused can say that he has been falsely implicated, especially when he was not found present at the scene of offence, and hence, the learned trial Judge ought not to have accepted the story placed by prosecution.

(ii)Two important witnesses, namely, complainant as well as daughter Bharti have turned hostile and when they have not supported the case of prosecution, the learned trial Judge ought not to have accepted the evidence brought on record

in the nature of dying declaration of deceased Bistuben because these two witnesses have categorically stated that when they saw Bistuben in an injured condition lying in the open area abutting residential house of the accused and the deceased, she was unconscious. The nature of injury near the neck found by the doctor was very serious in nature and therefore, the learned Sessions Judge ought to have held that the deceased would not have uttered a single word and therefore, dying declaration recorded by police or executive magistrate or by the doctor, should not be accepted as trustworthy evidence, and the learned trial Judge has grossly erred in linking the accused with the crime placing reliance on these three dying declarations, exhs.7, 14 and 31. Ms.Sagar has taken us through all these three pieces of evidence which can be, in the eyes of law, said to be dying declarations within the meaning of

section 32 of the Indian Evidence Act. It is submitted that, even the dying declaration recorded by the executive magistrate also should not be accepted as a trustworthy evidence, because, there is no endorsement of a doctor of the hospital on the dying declaration whereby it can be inferred that the doctor was present all throughout when the dying declaration was recorded and the patient was conscious, and that too, in the fit state of mind. The absence of endorsement to this effect on the dying declaration exh.14 makes this document doubtful. According to her, with this infirmity, it is possible to infer that two different sets of possibility are emerging and therefore, the accused ought to have been given benefit of doubt by the learned trial Judge.

(iii) In the alternative, she submitted that the sentence imposed by the learned trial Judge is very harsh and a poor tribal normally would not

be in a position to pay the amount of Rs.2,000/- and therefore, in default, he will have to undergo simple imprisonment of one year again. So, the total imprisonment would be of eleven years and therefore, this Court, taking liberal view, should modify the order of sentence passed by the learned trial Judge, and the same should be reduced to 7 years maximum.

3.To appreciate the say of the appellant, it would be proper for us to narrate the facts of the present case placed by the prosecution before the learned trial Judge. The prosecution is under obligation to prove the charge beyond reasonable doubt and allegations made against the accused should be established substantively through which the accused can be linked with the offending act alleged to have been committed. As per the facts placed by the prosecution, the deceased Bistuben was having married life of 15 years with accused Sonaku

and the family was residing at Village Vangan, Taluka Vansda. Out of three children, one daughter Bhartiben is prosecution witness. On the fateful day, deceased Bistuben was sleeping in the open space abutting to her residential house and PW Bhartiben was inside the house and the door was locked from outside by Bistuben. The accused was not there. He had gone to reservoir for fishing and on return, because of some quarrel, he assaulted the deceased Bistuben with an axe and he gave two blows on the body of the deceased Bistuben. The axe was being used for cutting the wood and it was lying in the house, and it was taken out by the accused and the deceased was assaulted. The daughter of Bistuben who was inside the house and complainant - Ramtubhai, who is residing in the neighbourhood, had run to the spot and the accused had left the place. According to prosecution, there was some conversation between the complainant Ramtubhai and the

accused, and thereafter, the accused had escaped from the place of incident. The injured was taken to hospital i.e. Cottage Hospital, Vansda, and in turn, the doctor informed the police by sending a yadi which is at exh.8 and Ramtubhai who has been examined at PW-4 lodged the formal complaint at Vansda police station. According to the prosecution, immediately after recording the complaint, further statement of the complainant came to be recorded wherein he unfolded the story as to why the deceased was assaulted so seriously. The allegation made against the accused by the prosecution is that, before about ten days, deceased Bistuben, in a company of one Julkiben, had gone to nearby village to fetch a goat from one Gandabhai, and when the accused came to know about this fact, he had followed both of them, and had gone to village Dhama in company of one Rangu Jivu, where he saw his wife behaving in a very friendly and cordial

manner with one Chhanabhai. The accused was not able to tolerate this conduct of his wife and he brought his wife back from village Dhama in an angry mood and thereafter, there was some quarrel between the accused and the deceased. The accused was alleging that deceased was to establish illicit relations with Chhanabhai under the guise of fetching goat from him or from village Dhama. On the fateful day, there was hot exchange of words on this issue and at about 1.30 a.m., the quarrel took a violent turn and the deceased was assaulted with two consecutive blows with axe. After sustaining injury, the deceased was lying on the ground, from where she was taken to hospital and was treated by medical officer of Vasda Hospital, where he recorded history and informed the police by sending yadi, exh.8, referred to hereinabove. The police recorded statement of deceased and arranged for recording of dying declaration of the deceased, and according to

the prosecution, the executive magistrate recorded her dying declaration in the early morning between 6.00 to 6.30 a.m. Police has drawn panchnama of the scene of offence and in turn, recovered the muddamal axe as well as the bloodstained clothes of the accused immediately after his arrest. These two muddamal articles, including clothes of the injured, accused and the muddamal axe, were sent to Forensic Science Laboratory and the prosecution has brought the report of analysis made by the scientist along with the serological report. On completion of investigation, the accused came to be charged and ultimately, on committal, tried by learned Sessions Judge. The learned Sessions Judge found that the evidence led by prosecution is sufficient to link the accused with the crime and therefore, the accused ultimately was held guilty of the offence under section 304 (Part I). Though the accused was charge sheeted and charged for the offence under section 302, but

it is held that as the accused was in a drunken condition and under the heat of excitement, he had given blows to the deceased, and therefore, the offending act cannot be said to be a murder within the meaning of section 300 of the IPC, but the act done by the accused is culpable homicide not amounting to murder falling in Part I category of the offence made punishable under section 304 of the IPC.

4. We have carefully gone through the reasons assigned by the learned trial Judge for recording conviction. According to us, there is no infirmity in evaluating the evidence, either documentary or oral. The evidence of hostile witnesses have also been correctly appreciated and discarded. It is important to note that the muddamal axe has been identified as an axe of the family of accused and none of these two witnesses who have been even declared hostile, are capable to dislodge one fact that

the accused had been to his residence on the fateful day. The incident had occurred at any time between 12.00 midnight and 4.00 a.m. and unless it is otherwise proved by cogent evidence, it will be difficult for the court to accept that the husband and the main male member of the family was not at his residence. It is true that, normally the deceased was going for fishing every night. But, it is also the case of prosecution that, on the date of incident, the accused was very well there when the deceased was assaulted with axe. The recovery of the bloodstained clothes of the deceased rules out the presence of accused at some other place than the place of incident. The prosecution has successfully established that the blood group of the deceased is the same as that which was found on the clothes put on by the accused and recovered by the police. It is true that the panchas have not supported the case of prosecution, but the evidence led

by the investigating officer as to the recovery of the clothes can be accepted as trustworthy evidence in the background of the other evidence brought before the court by the prosecution. The other evidence, may be direct, indirect or circumstantial, and therefore, the learned trial Judge has rightly accepted the contents of the panchnama drawn by the police as to the recovery of the clothes of the accused and muddamal axe. When the axe was normally used by the accused and he was aware about the place where the same was kept, it was possible for him to take out the axe from the place where it was kept and to give blows under influence of intoxication or under excitement.

5.The evidence of doctor is also rightly appreciated by the learned trial Judge. The nature of the injury found on the body of the deceased person was possible by muddamal axe. This is the opinion of the doctor. The force

of the blow is inferable from the width and depth of the blow which has been found near the neck. The second injury found on the left hand was also possible by muddamal axe. Therefore, the learned trial Judge has rightly said that the medical evidence led by prosecution corroborates the vital part i.e. dying declaration recorded by three different persons and in couple of hours from the time of incident.

6.Considering the contents of the certificate issued by the doctor exh.7, it is possible to infer that the doctor must have recorded the history from patient sometime between 4.00 and 4.30 a.m. and the doctor has specifically recorded that the patient, on asking, told that she had been assaulted by her husband with an axe at about 12.00 to 12.30 a.m. The narration of the time of actual assault may not be very much correct, but the important aspect that has

been accepted by the trial Court is that when she had an opportunity to name the assailant before an independent person like the doctor, she named her husband.

7.It is not necessary for us to re-write the judgement or to assign our own reasons for confirming the judgement and order under challenge. The reasons assigned by the trial Court can very well be adopted by us if they are convincing. According to us, the learned trial Judge has rightly said that the dying declarations, namely, the history recorded by the doctor and proved by him during his deposition, the dying declaration recorded by executive magistrate exh.14, satisfactorily proved by the magistrate who has been examined by prosecution, are consistent and therefore, the consistency of the very version found in the statement recorded by the police at exh.31 also can be said to be a dying declaration

consistent to the two dying declarations made by her and therefore, there is no need to have any other independent evidence or corroboration to link the accused with the crime. It is true that the executive magistrate has not obtained a formal certificate of the doctor in the dying declaration recorded by him, but one endorsement is found on yadi exh.13 wherein the doctor has recorded that the patient is conscious, which is sufficient according to us when the doctor has stated on oath that he has made this endorsement after the arrival of the executive magistrate in the hospital for the purpose of recording the dying declaration. So, the alleged infirmity pointed out by Ms.Sagar cannot be said to be serious infirmity. On the contrary, according to us, it does not remain infirmity in light of the evidence led as to the proof of endorsement made in yadi exh.13. The deposition of the doctor at exh.6 has satisfactorily proved the

nature of injuries found on the person deceased and in response to the query raised by the court, it is fairly accepted by the learned APP as well as Ms. Sagar that injury No.1 described in column 17 of P.M. Note is grave in nature. Merely because there is no reference of any bandages on the neck would not make the place of injury found on the body doubtful. The doctor has drawn a rough sketch and pointed out the place where he had seen the injury when autopsy was carried out and there is no conflict as to the description of the wound found by the doctor when she was initially treated and the autopsy was carried out after the description of injury No.1 found in column 17 of the P.M. Note as well as the evidence of the post mortem note is sufficient to infer that the blow must have been given with great force and the force of the blow used by the accused while giving blow can be looked into while drawing inference as to the intention of

the accused i.e. the author of injury. The size of the wound also indicates that the weapon used for causing injury must have caught blood and the prosecution has proved that the axe recovered by the police during investigation is bloodstained and the blood found on the muddamal axe is of the same group of the deceased. This evidence has been rightly considered as corroborative piece of evidence to the evidence led in the nature of dying declarations. Therefore, the learned trial Judge, according to us, has recorded the finding on the narration of the facts by the deceased in dying declaration. As per settled legal position, a solitary dying declaration can be believed and the accused can be convicted in the present case. There are three dying declarations having sufficient corroboration from medical evidence, the Forensic Science Laboratory Report, panchnama of recovery of clothes of the accused, muddamal

axe and the scene of offence panchnama.

8.The fact that the accused was in a drunken condition and was under the influence of liquor accepted by the learned trial Judge would not help the accused in any manner and would not make the offence lighter than actually placed before the learned trial Judge. However, the learned trial Judge, after considering the totality of the facts and circumstances, has observed that the offence against the accused can be said to be proved, is punishable only under section 304 - Part-I and not under section 302 IPC. There is no appeal preferred by the State against the order of acquittal recorded by the learned trial Judge qua the offence u/s 302 IPC. There is even no appeal of the State for enhancement of punishment. So, accepting the reasons assigned and adopted by the learned trial Judge, we can dismiss the appeal saying that no interference is

warranted.

9.The alternative submission advanced by Ms.Sagar is also found not acceptable so far as substantive sentence imposed for the offence proved against the appellant accused is concerned. Merely because accused has young daughters and he is a poor tribal having three children, the gravity of the offence should not be assessed less than actually placed and proved by the prosecution. Unarmed lady if assaulted by her husband suddenly on a small quarrel, and that too, on suspicion as to her character, is a serious offence. It appears that no direct cause of provocation was given by the victim at relevant point of time, because no such circumstance is emerging from the evidence available on record. Merely the nature of the accused was quarrelsome and he was under the influence of alcohol, would not make him entitled for any punishment lesser

than what has been imposed by the learned trial Judge. It is rightly held that the offence would fall in the first part of section 304 IPC and not in the second part of section 304 IPC. The deceased was found with two injuries and it will not be possible for any court to infer, in absence of direct evidence, as to which blow was inflicted first. So, in view of the nature of injury found on the person deceased and the circumstances under which the offending act has been committed, the learned trial Judge has rightly convicted the accused under Part I of Section 304 IPC and has imposed punishment of rigorous imprisonment for ten years. There are no good reasons to reduce the punishment imposed. Normally, the court should not blindly reduce the punishment to the period already undergone merely because he has undergone the period of sentence of about more than six years and he would earn some remissions as per the scheme framed by the

State Government in the background of the policy laid down for administration of jail and prisoners. A lady who lived long 15 years of married life, has been done to death for no reasons or cause. If we decide to reduce the quantum of punishment, it would take away the element of deterrence and therefore, we are unable to accept this submission made by the learned counsel Ms.Sagar for the appellant accused. It is true that the amount of fine imposed by the learned trial Judge can be reduced because Rs.2,000/- is a big amount for a poor tribal, especially when he was doing a labour work and during night hours, he was catching fish from the nearby water reservoir or pond situated in the neighbouring areas. So, the amount of fine imposed, if reduced, he may not have to undergo simple imprisonment for a longer period. The learned trial Judge could have imposed token fine of Rs.100/- or Rs.200/-. So, we are inclined to reduce the

amount of fine from Rs.2,000/- to Rs.200/-, and say, in default of paying the amount of fine, he shall undergo simple imprisonment for thirty days. Therefore, this slight modification, ultimately, shall save some precious months of the accused and he can utilise this period in arranging for settlement of his own daughters on return from the prison.

10. In the result, the present Criminal Appeal is partly allowed. The impugned judgement and order dated 5th July 2000 passed by the learned Sessions Judge, Valsad, at Navsari in Sessions Case No.114 of 1999, convicting the appellant - accused for the offence u/s 304 (Part I) IPC is hereby confirmed. However, order of sentence is modified to the extent that order imposing sentence of rigorous imprisonment for 10 years is hereby confirmed, but order imposing fine of Rs.2,000/- [Rupees two thousand only], in default, to undergo simple imprisonment for one

year, is hereby altered and reduced to the extent that the appellant - accused shall pay fine of Rs.200/- [Rupees two hundred only], in default, to undergo simple imprisonment for thirty days. Order accordingly.

[C.K.BUCH, J.]

[HARSHA DEVANI, J.]

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